IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5908 OF 2006

Dnyaneshwar Sakharam Modak .... Petitioner
Vs.
Somaji Raghoji Modak & Ors. .... Respondents

Mr. V.S. Gokhale for the Petitioner

Mr. P.J. Thorat i/b Mr. R.A. Thorat for the Respondent no. 1.

CORAM : R.M. SAVANT, J.
DATE : 13TH JUNE, 2007

P.C.

1) Rule with consent of the parties made returnable forthwith and heard.

2) This petition impugns the order dtd. 28th March 2006 passed by the learned Adhoc Additional District Judge, Pune, by which order petitioner's application for restoration of Miscellaneous Application no. 697 of 2001 came to be rejected. Such of the facts which are necessary to be cited are stated thus :

. The petitioner is the original defendant no. 2 in Regular Civil Suit no. 2684 of 1989.

The respondent no. 1 is herein is the original plaintiff and respondent no. 2 is the original defendant no.1. The respondent no. 1 herein filed suit for specific performance of an agreement in respect of half share in the agricultural land being gat No. 59 admeasuring about 3 Hectare at village Vadki, Tal. Haveli, Dist. Pune. The said suit was decreed in favour of the plaintiff on 17/2/2001. Being aggrieved by the decretal of the said suit, the petitioner preferred an appeal against the said decree. Since appeal was belated by about six months, the petitioner filed the delay condonation application which was numbered as Miscellaneous Application no. 697 of 2001. The said application came to be dismissed for non prosecution on 6/3/2003. The petitioner thereafter filed a restoration application on 3/5/2003, since there was a delay of about one month in filing the said restoration application, the petitioner also filed Miscellaneous Civil Application 358 of 2003 for condonation of delay in filing the said restoration application. The petitioner had sought to justify the delay on account of some mis-understanding of the dates on which the application was to come up for hearing.

3) The delay condonation application bearing

Miscellaneous Civil Application no. 358 of 2003 came to be allowed and the delay in filing the restoration application came to be condoned. The learned Judge thereafter proceeded to deal with the said restoration application. The restoration was sought on identical grounds on which delay condonation was sought. However, in so far as the restoration application was concerned, the learned Judge did not deem it fit to accept the said grounds. Resultantly the impugned order came to be passed.

4) It is submitted by Shri. Gokhale, learned counsel for the petitioner that the reasoning given by the learned Judge after having accepted the self same grounds for condonation of delay is un-tenable. The learned counsel submits that he had complied with the conditions imposed by the trial Court while condoning the delay. The learned counsel further submits that on account of the dismissal of the restoration application, he would be virtually non suited.

5) On the other hand, Shri Thorat, learned counsel for the contesting respondent contends that no case of restoration had been made out. Learned counsel further contends that the petitioner has

been negligent and callous in prosecuting his remedies. In that view of the matter, Shri. Thorat submits that the petitioner is not entitled to the exercise of discretion by this Court. In my view, the non acceptance of the same reasons for condoning the delay is un-tenable. The trial Court has not mentioned why the said reason cannot be accepted. In any event in matters of restoration, highly technical approach should be eschewed and an approach which furthers the cause of justice should be adopted. The petitioner in my view deserves to prosecute his appeal on merits. In that view of the matter the order passed on the restoration application is set aside. The Miscellaneous Civil Application no. 697 of 2001 is restored to the file, the trial Court to decide the said application on its merits and in accordance with law; uninfluenced by the observations made in this order. Since the suit is of the year 1989 and decree was passed in the year 2001, the said Miscellaneous Civil Application No. 697 of 2001 is directed to be disposed of by the trial Court within two months from date.

6) In my view interest of justice would also be served if the petitioner is directed to pay costs of Rs.3,000/- to the respondent no. 1 as a

condition precedent within three weeks. On the petitioner producing evidence of having paid the costs to the respondent no. 1, the Miscellaneous Civil Application no. 697 of 2001 is to be heard in the manner indicated above.

7) In the event, the petitioner fails to pay costs as directed above, the petition to stand dismissed.

8) Rule is absolutely made absolute in the aforesaid terms.

9) Parties to act on a copy duly authenticated by the Sheristedar of this order.

(R.M. SAVANT, J.)